Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-3781

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs-Appellants,

—against—

JEROME A. AMBRO, Supervisor, RICHARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE, HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC., TO DISMISS APPEAL

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Appellee, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., moves to dismiss this appeal on the ground that no substantial federal question is presented.

I

A municipality's restriction of land ownership, operation and use to a particular class of persons presents a substantial federal question of equal protection of the law.

The question presented by the Appellants herein is a case of first impression for this Court. This is so because zoning has always been unalterably considered as ". . . the regulation by the municipality of the *use of land* within the community, *and of the buildings and structures* which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute". *Rathkopf, 4th Ed. 1975, the Law of Zoning and Planning, S. 1.01. The fundamental principle of zoning* is *regulation of land use* without regard to the identity of the owner or user at any given time (*ibid*, p. 1-21).

The basic error of the courts below and of the Appellees, as so clearly appears in its motion papers, consists in referring to the regulation of the owner, user and operator under the Town of Huntington's ordinance as a regulation of land use. (Appellee's Motion, Point I, page 2, ". . . the power to regulate the land giving due regard to the user"). All prior decisions have unanimously and universally held that such regulation of the owner, operator or user is an unauthorized exercise of the zoning power. *Abbadessa* v. *Board of Zoning Appeals*, 134 Conn. 28, 54 A 2d 675; *O'Connor* v. *City of Moscow*, 69 Idaho 37, 202, P 2d 401, 9 ALR 2d 1039 (1949); *Vhabos* v. *Little Boar's Head District*, 146 A 2d 257 (N. H. Sup. Ct. 1958); *Fox* v. *Johnson*, 275, N.E. 2d 637 (Ohio App.

1971); *Olevson* v. *Zoning Board of Review*, 71 R.I. 303, 44 A 2d 720; *Boulevard Scrap Co.* v. *Mayor and City Council of Baltimore*, 213 Md. 6, 10, 130 A 2d 743, 745 (1957); *Bridge Park Co.* v. *Borough of Highland Park*, 113 N.J. Super. 219, 273 A 2d 397 (A.D. 1971); *Maplewood Tenants Ass'n* v. *Maplewood Village*, 116 N.J. Super. 372, 282 A 2d 428 (Ch. Div. 1971); *Soho Park & Land Co.* v. *Board of Adjustment*, 6 N.J. Misc. 683, 142 A. 548 (1928); *Bernstein* v. *Village of Matinecock*, 60 M 2d 470, 302 S 2d 141 (1969); *Crow* v. *Brown*, 332 F. Supp. 382 (1971); *Women's Kansas City Soc'y* v. *City of Kansas City*, 58 F.2d 593 (1932); *Molino* v. *Mayor and Council of Borough of Glassboro*, 116 N.J. Super. 195.

The two more recent decisions in the State of New Jersey cited in Appellants' Jurisdictional Statement (p. 10), follow the universal and settled principle that zoning ordinances establishing districts giving due regard to the owner or user are illegal and void. *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super. 376 (App. Div. 1973) 311 A 2d 187; *Shepard* v. *Woodland Township Committee and Planning Board*, 128 Super. 379 (Sup. Ct. Ch. Div. 1974) aff'd 135 N.J. Super. 97 (App. Div. 1975). In both cases zoning ordinances limiting occupancy to "senior citizens" were held unreasonable, arbitrary and discriminatory, in violation of the equal protection clause of the Fourteenth Amendment, since age has no realistic relationship to a recognized objective of zoning legislation.

Appellee's argument that the ordinance does not limit land use to the aged, nor restrict ownership to non-profit corporations organized in New York, is perhaps technically correct, but specious in effect. As the dissenting opinion so significantly pointed out in the Court of Appeals (Jurisdictional Statement, p. 10a, n.1), the practical and intended effect is to limit usage in this type of district to such retirement community. This fact is more

than amply demonstrated by the Town's own action in this regard.

The Town has adopted two Retirement Districts to date: the one involved in this appeal, and another in the Greenlawn area of the Town. Each consists of a twenty acre parcel on which can be constructed only the multiple dwelling units of the project, a community building, and the sewer and parking facilities required to service the community. There is no remaining space in either district on which to erect even one single family house, much less places of worship, schools, fire stations, and the like. This is substantial evidence that the practical and intended effect is to limit the districts to the retirement project.*

Appellee's argument in Point II of its motion is wholely irrelevant. The acts and statutes there cited have no relation to zoning. Article XVIII of the New York State Constitution empowers the *State* legislature to provide for *low rent housing for persons of low income.* Article XVIII has no application to zoning. The delegation of the zoning powers to towns is embodied solely in Town Law S. 261 (Appendix A, p. ....). That statute limits a town to regulation of the use of the land and the buildings and structures thereon.

Furthermore, the zoning ordinance involved here makes no reference whatever to persons of low income, to low rent housing, or to persons in retirement. Since zoning statutes have always been strictly construed, *440 East 102nd St. Corp.* v. *Murdock*, 285 N.Y. 298, 34 N.E. 2d 329 (1941); *Off-Shore Restaurant Corp.* v. *Linden*, 30 N.Y. 2d 160, 331 N.Y.S. 2d 397, 282 N.E. 2d 299 (1972); *Village of Stamford* v. *Fisher*, 140 N.Y. 187; Rathkopf,

* The Greenlawn parcel is the subject of an action now pending on appeal to the New York State Court of Appeals (*Biggs et al.* v. *Town of Huntington, et al.*).

4th Ed. 1975, *The Law of Zoning and Planning*, S. 9.01, and cases cited, it is quite clear that this ordinance by its own language is not designed for low rental housing, to providing housing for persons of low income, or to persons in retirement. Even age, as the record shows, is a factor left entirely to the discretion of the Appellee. There being no limitation on income or to retirement with regard to residency in this district, Appellee's continual references to such matters in its motion are totally without any factual or legal foundation, and designed solely to enlist the sympathy of the Court.

An ordinance such as this, which provides for a use restricted to certain members of the community seemingly based on age (a vague and undefined term whose interpretation is left entirely to the discretion of the Appellee), is invalid because: (1) it discriminates and denies equal protection of the law to persons similarly situated, and (2) bears no reasonable relationship to the purposes of the enabling act, i.e., to regulate the use of the land.

If *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926), presented a substantial federal question, then surely this case, involving as it does the establishment of an entirely new concept of zoning classification by a municipality acting wholly beyond the scope of its delegated powers and in contravention of all established and settled principles governing the power of land use restriction, presents an even more important issue for this Court's consideration and determination.

CONCLUSION

A substantial federal question having been presented and one of first impression, the court should deny appellee's motion to dismiss.

Respectfully submitted,

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APPENDIX

Town Law, S. 261

S. 261. GRANT OF POWER: APPROPRIATIONS FOR CERTAIN EXPENSES INCURRED UNDER THIS ARTICLE.—

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriation as it may see fit for such charges and expenses, provided however that such appropriation shall be the estimated charges and expenses, less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.